

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of  
Harold W. Wood,

Petitioner,

V.

Independent School District  
No. 691,

Respondent.

FINDINGS\_OF\_FACT,  
CONCLUSIONS AND  
RECOMMENDATION

The above-entitled matter came on for hearing on October 7, 1986, at the St. Louis County Courthouse in Virginia, Minnesota. The record in this matter closed on December 26, 1986. William R. Ojala, President of Local 2780, American Federation of State, County and Municipal Employees, Box 217, Aurora, Minnesota 55705, appeared on behalf of the Petitioner, Harold W. Wood ("Employee", "Veteran"). John M. Colosimo, Esq., Greenberg, Colosimo & Patchin, Ltd., Law Center Building, 301 Chestnut Street, Virginia, Minnesota 55792, appeared on behalf of the Respondent, Independent School District No. 691 ("Employer", "District"). Gene Miller, Veteran's Preference Officer, 174 Federal Building, Fort Snelling, Minnesota 55111, appeared on behalf of Veterans Affairs Commissioner William J. Gregg to aid in the development of a complete record.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Veterans Affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with William J. Gregg, Commissioner of Veterans Affairs, Second Floor Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155.

STATEMENT OF ISSUE

Whether the Petitioner was discharged from his employment as a building maintenance custodian for Independent School District No. 691 on or before

November 22, 1985, without a hearing to determine incompetence or misconduct,  
in violation of Minn. Stat. 197.46.

Based upon all of the records, filings and proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF-FACT

1. Harold W. Wood is a 45-year-old veteran of the United States Navy. He served four years and was honorably discharged with the rank of Boiler Tech 3 (pay grade E-4) in March, 1967. The Employer stipulates that he is a qualified veteran within the meaning of Minn. Stat. 197.447.

2. Mr. Hood was employed as a Building Maintenance Repairer by independent School District No. 691 (Aurora-Hoyt Lakes, Minnesota) between August 23, 1984 and November 22, 1985. He received his Class "B" Boilerman's License several weeks after being so employed. He worked the first shift (6:00 a.m.-2:30 p.m.) at Boase Elementary School in Hoyt Lakes.

3. Throughout the course of his employment, Mr. Wood's salary (\$9.05 per hour) was subsidized by program funds made available through the United States Veterans Administration, pursuant to the Emergency Veterans Job Training Act of 1983.

4. As a condition of continuing subsidization by the Veterans Administration (VA), the Employer filed periodic Certifications of Training with the VA. On each such occasion (October 10, 1984, January 10, 1985, April 16, 1985 and July 8, 1985) the District reported to the VA that Mr. Wood's progress was "satisfactory". In a follow-up call to the District in December 1984, Veterans Employment Representative John Green, an employee of the Minnesota Department of Jobs and Training, was informed that Wood was doing an "excellent" job.

5. Between January 1 and November 1, 1985, complaints were made to Mr. Wood's supervisor, Bill Koch (the District's Director of Buildings and Grounds) regarding the quality of Mr. Wood's work. The chief complaint was that, in general, the Veteran worked too slowly. Koch talked to Wood about these problems but never issued any written warnings during this period of time.

6. In addition to general complaints regarding slow work, complaints were made regarding not properly cleaning up the gym, for not taking on obvious chores that were outside his specific job assignment, and for leaving too much work for the second shift maintenance man. Richard Domanoski, the Principal at Boase, Sheila Wobbe, the Acting Principal, and Donald Burr, the other janitor at the school, were the chief sources of complaints. On July 20, 1985, Mr. Domanoski issued a written complaint, copies of which went to Mr. Koch and into Mr. Wood's personnel file, against the Veteran for not keeping a drinking fountain clean.

7. On November 1, 1985, Mr. Koch called a meeting with Mr. Wood, Mr. Domanoski and Donald Burr. The purpose of the meeting was to review the Veteran's work performance. Koch covered Wood's slow work pace and the uneven quality of his work and warned him that unless there was "drastic improvement", disciplinary action such as time off (as much as two weeks without pay) and, ultimately, discharge could result. Wood said that he understood this and would try to improve. Koch also decided, in order to

better compare the work performances of Wood and Burr, to put them on rotating shifts, since each shift had certain duties specific to it. This meeting, including the warning to the Veteran, was summarized in a memorandum issued to Wood on Tuesday, November 5, 1985.

8. On November 8, 1985, Mr. Wood had a problem with starting the boiler at the Boase School. At approximately 6:00 a.m., he called Koch at home and told the Director of the problem. Koch reviewed some of the starting and trouble-shooting procedures with Wood and said he would get to Boase as soon as he could.

At approximately 6:15 a.m., Wood got the boiler started. He called Koch's house to report this information, but Koch had already left. Koch's wife was awakened by the call.

9. At approximately 8:00 a.m. on November 8, Koch arrived at Boase School. He was relieved that Wood had gotten the boiler started, but expressed irritation to Wood for (1) waking up his wife and (2) not seeming to understand certain "elementary" terms and operations involved in boiler operation, concepts Koch believed were well known to any licensed boiler operator. Donald Burr was present for this conversation, and also accompanied Wood and Koch to the boiler room for a review of starting procedures. Koch did not raise his voice during the initial conversation with Wood nor during the boiler-room demonstration.

10. At approximately 8:20 a.m., the three men returned to the custodians' break room. Koch asked Wood why, if he had been employed for over a year at the school and had been shown proper lighting and troubleshooting procedures, he did not know where the "fire-eye control" was located. Wood said he had forgotten. Koch then reminded him of the warning issued a week earlier--that Wood had to improve his job performance or Koch would recommend discipline and, possibly, termination. He told Wood that he "had a choice". Wood replied that he had been thinking about quitting since the events of November 1, and stated that he was "not able to do the job". Koch told him that it was his (Wood's) decision to make, but that the Administration would have to prove Wood was not performing his job duties in order to terminate him. Wood asked about the notice period, and Koch said two weeks' notice was required under the union contract. When Wood asked, "Who do I tell I?", Koch said to put it in writing.

11. Mr. Wood then wrote out a resignation note to the School Board,

effective November 22, 1985. The reason given on the note is:  
"I am unable  
to perform duties of the licensed custodian position". Koch told  
Wood that he  
did not have to resign and that, if the Administration ever tried  
to fire him,  
that he could take his case before the Board. He did not mention  
any  
veteran's preference rights to Mr. Wood. Mr. Koch never raised  
his voice  
during this conversation and never threatened Wood with  
discharge, except to  
remind him of the November 1 warning. Koch did not have the  
authority to  
terminate Wood from employment. The Veteran could only be  
discharged by the  
School Board.

12. On November 11, 1985, the Board of School District No.  
691 accepted,  
with regrets, the resignation of Mr. Wood, effective November  
22. Earlier  
that day, Mr. Domanoski and Thomas Lubovich, the District's  
Superintendent,  
met with Mr. Wood, reminded him of the Board meeting that evening  
and asked  
him whether he really wanted to resign. Wood said, "Yes, I plan  
to resign, it  
is my resignation". Lubovich then asked, "Is this what you want  
to do?" and  
the Veteran replied, "Yes.". Mr. Wood did not appear at the  
Board meeting,  
nor did he ever complain to the District's Administration that  
Koch had put  
any pressure on him to resign.

13 On or about November 15, 1985, Mr. Wood informed his union steward, William Ojala, that he wanted to try to get his job back.' A meeting was scheduled for November 21, between Wood, Ojala and Fred Hudola (then the Union President) on one side and Lubovich, Koch and Domanoski for the Administration. The meeting never took place. Wood decided not to have the meeting because there was "no hope" and he had "no fight left". He told Koch on November 20 that he did not want the November 21 meeting, and Koch communicated this to Lubovich.

14. As of November 22, 1985, if Mr. Wood had wanted his job back and then asked for it, Lubovich and Koch favored his continued employment. Domanoski was against Wood's continued employment. However, after writing out his resignation, handing it to Koch, and after the resignation was accepted by the Board, Wood never told Koch, Lubovich, or any other member of the District Administration that he wanted his job back.

15. Mr. Wood never filed a grievance procedure, which he had a right to do under the contract between Local 2780 and the District, with respect to his separation from employment or at any other time. On February 21, 1986, the Veteran petitioned for a Veterans Preference hearing pursuant to Minn. Stat.

197.481 . In his Petition, Wood alleges that he was denied a hearing regarding his separation from employment, which separation he characterized as a "termination". He specifically alleged that Koch left him with no choice on November 8 after telling him that he (Koch) was going to do everything in his power to get him (Wood) fired, and that his resignation was given under duress.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have Jurisdiction in this matter under Minn. Stat. 14.50 and 197.481.

2. The Notice of Hearing was proper and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Any of the foregoing Findings of Fact which should more properly be designated as Legal Conclusions are hereby adopted as such.

4. The Petitioner, Harold W. Wood, is a veteran within the meaning of Minn. Stat. 197.447.

5. Independent School District No. 691 has not violated Minn. Stat. 197.46 by denying any preference or privilege granted to Harold Wood under that statute because the Veteran quit his employment and was not removed from his employment. The statute grants a right to a hearing to determine incompetence or misconduct only to veterans who are removed from employment,

'As of the time of the hearing, Hr. Ojala had become the Union President.



Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS RECOMMENDED that the Petition on filed by Harold W. Wood on February 21, 1986 be DISMISSED.

Dated this            day of December, 1986.

RICHARD C. LUIS  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

#### MEMORANDUM

The Petitioner's central contention is that he was forced out of his job, essentially terminated, and that his resignation was given under duress. He would be entitled to a hearing before a Veterans Preference Board if he was, in reality, "removed" from his job. After review and analysis of the evidence before him, the Administrative Law Judge has concluded that Mr. Wood's resignation was bona fide and he was not removed from his position as a janitor at Boase Elementary School. Therefore, he is not entitled to a Veterans Preference hearing to determine if he was removed for incompetence or misconduct.

The key event in this case is the conversation, between Mr. Wood and his supervisor, Bill Koch, on November 8, 1985. Donald Burr, Wood's co-worker, witnessed the conversation. The testimony given by Koch and Burr differs from Wood's recollections. Findings of Fact Nos. 9, 10 and 11 constitute the result of the Judge's decision to believe the accounts of Koch and Burr, as opposed to the testimony offered by Harold Wood, regarding certain key details.

Wood contends that Koch was mad at him, called him incompetent and said, "I'm going to do everything in my power to get you fired.". Koch denies this, and Burr's testimony supports Koch. Wood testified that he then said, "When do you want the keys?" and Burr left the room. Burr denies that he left. Wood claims Koch then asked, "Will you resign?", to which he said, "I can't keep going like this, how do I do it (resign)?". He alleges Koch then gave him paper and pencil and actually dictated the contents of the resignation note. The Administrative Law Judge does not believe this account.

First, Mr Wood did not impress the Administrative Law Judge as being, in general, a credible witness. His speech was hesitant, he appeared overly nervous, and he mumbled many key portions of his testimony. His representative argued that Wood is shy, hesitant and inarticulate by nature, and the Judge recognizes that the evidentiary hearing setting can be intimidating, but it is also noted that the witness's demeanor was also consistent with that of a person who is not telling the truth. In contrast, Koch and Burr delivered their testimony in a more confident, consistent and believable fashion.

Second, Mr. Wood never complained to Superintendent Lubovich or any other school administration official about being forced to resign, and he confirmed, three days later, to Lubovich and Principal Domanoski that the decision to resign was his.

Third, on November 20, 1985, the meeting set for the next day between Wood and his Union Representatives and the Administration was cancelled. The Administrative Law Judge has found that Wood cancelled the meeting and communicated this to Koch. Wood testified that Koch told him that the meeting was cancelled, yet he acknowledges in his testimony that Koch told him the meeting could be held instead on November 22. He testified that he refused to meet the next day because he felt that there was no hope left. He testified that he came to that conclusion because the Administration had postponed the meeting for one day--a conclusion that simply defies logic and is not supported by the rest of the testimony. If Wood had wanted his job back, the postponement of the meeting to discuss that by one day is simply too trivial a reason to "give up the fight". It is more likely that Wood cancelled the meeting because he had decided to abide by his original decision to resign.

Even if Wood's version of the November 8 conversation is accepted, the Administrative Law Judge does not believe that the facts established to arrive at that version of events entitle Wood to a Veterans Preference hearing. This is because, even taking the facts in the light most favorable to the Petitioner, he still resigned and was not removed from his employment. He knew, or should have known, that Koch did not have the authority to fire him. Wood testified that Koch told him he could "go before the Board". Therefore, even if Koch said he would do "everything in his power" to fire Wood, it is clear, even under Wood's version of the event, that Koch had not fired him.

Wood testified that he wrote out the resignation after Koch said, "Will you resign?" and that Koch "dictated" the words of the note after he (Wood) asked how to do it. Such a scenario (which the Administrative Law Judge has not accepted) may establish a resignation under duress, but it is also

consistent with a neutral inquiry about his (Wood's) intentions, and with a desire on Koch's part to see to it that, if Wood was quitting, he went about it properly.

Two Minnesota Court of Appeals cases involving unemployment compensation claims, where the issue was whether the employee quit or was fired, provide guidance in analyzing this case if Wood's version of the November 8 incident is given credence. The first, Ramirez v. Metro Waste Control Commission, 340 N.W.2d 355 (Minn. App. 1983), holds that when an employee resigns from employment in order to protect his work record from showing a discharge for tardiness, that action constitutes a voluntary termination of employment, in the absence of evidence that the employer told the employee that he was fired

or asked for his resignation. The Court of Appeals held that such was the case notwithstanding that it was, in fact, likely that the employee would have been discharged. In that case, Ramirez was told by his supervisor that it was likely he would be fired, but a formal decision to do so had not yet come down from the Commission's chain of command when Ramirez presented his resignation and it was accepted. Quoting from an earlier Minnesota Supreme Court case, the Court of Appeals described voluntary unemployment as the exercise of "a free-will choice and control" in terminating the employment. See *Anson v. Fisher Amusement Corp.*, 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958). The Court also cited the case of *Board of County Commissioners v. Florida Department of Commerce*, 370 So.2d 1209 (Fla. App. 1979), where it was found that an employee voluntarily terminated his employment "When . . . in the face of allegations of misconduct (he) chooses to leave his employment rather than exercise his right to have the allegations determined

The same precedents relied on in the Ramirez case were applied in *Seachrist v. City of Cottage Grove*, 344 N.W.2d 889 (Minn. App. 1984), where a police sergeant resigned rather than face disciplinary proceedings that would have adversely affected his application for a police chief job in another city. In that case, the Cottage Grove police chief demanded the employee's resignation or the chief would have initiated disciplinary proceedings immediately, and the Court of Appeals, relying on *Anson v. Fisher Amusement Corp.*, supra, still held that the separation was voluntary. 'See 344 N.W.2d, at 891, where the Court holds:

"The question of whether a termination is voluntary or involuntary is determined 'not by the immediate cause or motive for the act but by whether the employee directly or indirectly exercised a free-will choice and control as to the performance or non-performance of the act'. *Anson*, supra; *Wing-Piu Chen v. Pagoda, Inc.*, 342 N.W.2d 174, 175 (Minn. App. 1984)"

Based upon the Ramirez and Seachrist holdings, Mr. Wood must be viewed as a person who quit his employment and was not fired. He was informed that the Board would rule on his case so he knew (or should have known) that Koch alone could not fire him. Under Ramirez, a resignation in those circumstances is voluntary even though it is likely that the employee would have eventually been fired. Under Seachrist, an employee who was forced to resign or be fired

for allegations of misconduct still was held to have resigned when he knew, or should have known, that any discipline resulting from the alleged misconduct could be contested. While both such cases involve resignations in the face of allegations of misconduct, not incompetence, they are still very persuasive in analyzing the issue in this case. It should be remembered that the above analysis only comes into play if it is held that Mr. Wood's allegation that Koch forced him to resign, or in the alternative, was going to do "everything in his power" to get him fired, is true. However, the Administrative Law Judge has found that Koch was not yet at that point. He had warned Wood that progressive discipline could follow if he did not improve his work, but had gone no further.

At the hearing, Mr. Wood's representative asked the Administrative Law Judge to take judicial notice of the decisions of the Minnesota Department of Jobs and Training regarding Wood's separation from employment. He also asked the Judge to give res judicata effect to the Department's "final" decision.

The Judge refused to do so at the hearing and, after considering the post-hearing argument submitted on the issue, it has been decided not to grant such status to the Jobs and Training determinations.

Although the parties to the case before the Department of Jobs and Training and in this proceeding are the same, the witnesses testifying in the two proceedings were different. In addition, the issues are not parallel. The ultimate issue to be determined in the unemployment case was Wood's eligibility for benefits under Minn. Stat. ch. 268. Under that Code, a person who quits employment can still be held eligible for benefits if the cause for separation was "good cause attributable to the employer". Employees do not have to be discharged in order to "win" such a case. Mr. Ojala argues that since Mr. Wood won full entitlement to unemployment benefits, he must have been "involuntarily separated" from his employment. Such a conclusion simply

does not follow. The issue in this case is different. Under Minn. Stat.

197.46, a veteran employed by a school district has a right to a due process hearing only if he has been "removed" from employment, and the character of the separation from work (a quit or a discharge) is the ultimate issue. That

decision should only be made on the facts elicited in this record. Accordingly, the judge has confined his deliberations to what he heard in Virginia on October 7. If the Commissioner of Veterans Affairs decides to take notice of the unemployment benefit decision made by the Department of Jobs and Training, however, the relevant document is being transmitted, under seal, to him along with the official record accompanying this Report.

R.C.L.